REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 257 of 2008

Between

MICHAEL DINDAYAL

Appellant

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

PANEL: **N. BEREAUX, J.A.**
R. NARINE, J.A.
P. MOOSAI, J.A.

APPEARANCES: **A. Ramlogan SC, K. Samlal and D. Helwig for the appellant**
D. Byam instructed by R. Grant for the respondent

DATE DELIVERED: 13 April 2017

I agree with the judgment of Bereaux J.A. and I have nothing to add.

R. Narine
Justice of Appeal

I too agree.

P. Moosai
Justice of Appeal

JUDGMENT

Delivered by Bereaux, J.A.

Introduction

[1] This is an appeal from the dismissal of the appellant's constitutional motion in which one of the primary issues involves consideration of the appellant's delay in filing his claim for constitutional relief. At the time of filing of his constitutional motion on 15th September 2003, the appellant held the rank of firefighter with over 23 years' experience. The position of firefighter is the lowest in the fire service establishment. He enlisted in the fire service in February, 1980. Up to the time of filing he had not been promoted, despite the attainment of several qualifications, attendance at various training courses and the receipt of numerous letters of commendation from his superiors over the years. He has never been the subject of disciplinary proceedings. He alleges that apart from one acting appointment in 1994, he had never, up to the filing of this action, received any acting appointment and that several officers junior to him received promotions and acting appointments over the years.

[2] The appellant alleges that the chief fire officer and the Public Service Commission have breached his right to equality before the law and the protection of the law, and to equality of treatment by a public authority, set out in sections 4(b) and 4(d) respectively. He also alleges that his right to procedural safeguards (against infringements of his fundamental rights) set out in section 5(2)(h) of the Constitution has been infringed. His complaint is in respect of four occasions in 1987, 1994, 1998 and 2003.

[3] Subsequent to the filing of the constitutional motion he has been promoted twice. On 30th August 2005, he was promoted to fire sub-officer, the next level in the establishment and on 14th February 2006 he was promoted to fire sub-station officer.

[4] As to his allegations of breach of section 4(b) and 4(d) he listed two specific comparators, fire officers Dereck Ambrose and Farrell Moore. They are

in respect of his applications for promotion in 1994, 1998 and 2003. Officer Dereck Ambrose was promoted in 1994 to the post of fire sub-officer and then in 1998 to fire sub-station officer, while officer Moore was promoted in 2003 to fire sub-officer. In officer Moore's case the appellant alleged that he was senior to officer Moore while both he and officer Ambrose were of equal rank in 1994.

[5] He also alleged that his staff and performance appraisal reports (by which his job performance was assessed) were not prepared and were not part of his personal record with the result that when he was considered for promotion, the chief fire officer and the Commission were not able to properly assess him and he was considerably disadvantaged. This was a breach of regulation 52 of the Fire Service (Terms and Conditions of Employment) Regulations (made under section 34 of the Fire Service Act Chap 35:50).

Findings of the judge

[6] The appellant's constitutional motion was dismissed in the high court on 3rd December 2008. The trial judge found that:

(i) In respect of the years 1987, 1994 and 1998 the appellant was guilty of undue delay in commencing proceedings. The bald explanation, without more, that he could not afford the cost of legal action, was not sufficient. The appellant should have disclosed the attempts made to bring proceedings and how they were unaffordable, detailing the circumstances for the benefit of the court. He thus had failed to provide any evidence which would satisfactorily explain his delay.

(ii) As to the non-preparation of his staff reports and the divisional sheets which were missing from his personal record, the appellant should have sought judicial review of the chief fire officer's breach of regulation 52 or against the Promotion Advisory Board for failing to consider his staff reports/personal appraisal reports.

(iii) The appellant's failure to make use of the parallel remedy of judicial review and his delay in applying for constitutional redress without satisfactory explanation amounted to an abuse of process.

(iv) As to the appellant's non-promotion in July 2003, the application was clearly late and in those circumstances, he could not claim inequality of treatment.

[7] Although the judge dismissed the 1994 and 1998 claims on grounds of delay he did go on to hold however that:

(i) The appellant did not provide proof of a deliberate and intentional discharge, by the chief fire officer or the Commission or the Promotions Advisory Board, of their respective functions in a manner which was unlawful and which resulted in his unequal treatment. In the absence of cross-examination of the deponents on their conflicting affidavit evidence, it was very difficult if not impossible for a court to resolve such conflicting evidence.

(ii) The appellant has also failed to establish that he was treated differently from other similarly circumstanced person or persons. In the case of officer Ambrose, after his promotion in 1994 he could not be considered a true comparator to the appellant since he was elevated in rank. Further, the appellant has failed to provide details of his personal work record between 1980 when he joined the fire service and 1994 when officer Ambrose was promoted, for the purposes of an inquiry as to whether or not he and officer Ambrose were similarly circumstanced during that period. Likewise, there is no evidence that can go towards establishing that officer Moore or any officers junior to the appellant were similarly circumstanced.

Issues

[8] The broad issues in this appeal are as follows:

(i) Whether the appellant was guilty of undue delay in filing his constitutional claim for the years 1987, 1994 and 1998.

(ii) Whether the appellant's rights under sections 4(b), 4(d) and 5(2)(e) of the Constitution were infringed.

(iii) What is the significance of the non-production of the staff reports for the years 1983 to 1984 and 1986 to 1999, in breach of the order of Aboud J?

Summary of decision

[9]

(i) The appellant was guilty of undue delay in pursuing his claims of breach of sections 4(b) and 4(d) of the Constitution for the years 1987 and 1994. The judge was right that no sufficient detail of his inability to finance the litigation had been produced by the appellant.

(ii) As to the 1998 claims the judge was plainly wrong. Even though the explanation of the appellant was not cogent enough, the delay was not so inordinate as to prevent the pursuit of the constitutional claim.

(iii) But in the event that I am wrong on the question of delay there was no breach of the provisions of section 4(b) or of section 4(d) in respect of the years 1987 and 1994. Neither was there a breach of the provisions of section 4(b) and section 4(d) for 1998.

(iv) In regard to the year 2003 the appellant's application was received after the deadline and was clearly late. In those circumstances the chief fire officer and the Commission were entitled to disregard it. The judge was right to find no breach of sections 4(b) and 4(d).

(v) In regard to the appellant's staff reports, however, the non-production of the appellant's staff reports for the years 1983 to 1984 and 1986 to 1999, in breach of the order of Aboud J, must lead to the adverse inference that they were never completed. The consequence was that the appellant, when being

considered for promotion by the Commission in 1987, 1994 and 1998, would not have had the benefit of the Commission viewing his reports. This was a breach of regulations 34(1) and 154(2)(e) of the Public Service Commission Regulations and 158(3)(d) of same regulations after their 1998 amendment. The failure to comply with these regulations was a breach of the appellant's right to procedural protection under section 5(2)(h) of the Constitution and consequently a breach of the appellant's right to the protection of the law under section 4(b) of the Constitution.

The appellant's case

[10] Although no issue was raised in respect of them, the relevant regulations which governed the promotion of the appellant prior to 1998 were the Public Service Commission Regulations. They were amended by legal notice # 282 of 1998. The result is that two different regulatory regimes governed the appellant's promotion over the two decades that his claim traverses. Prior to 1998, the appointment and promotion of fire officers was governed by regulations 146 to 161 of the Public Service Commission Regulations (the old regulations). From 1998, Part 1 of Chapter II of the Fire Service (Terms and Conditions of Employment) Regulations as well the Public Service Commission Regulations as amended by legal notice # 282 of 1998 governed appointments and promotions of fire officers (the amended regulations).

[11] As to 1987 and 1994 the appellant stated that he was interviewed by the Promotions Advisory Board for promotion to the rank of fire sub-officer but was never promoted. On 27th day of August, 1998 he wrote the chief fire officer to complain about the fact that he had been constantly by-passed for promotion. The appellant received a reply dated 9th day of November, 1998 (which mistakenly refers to the appellant's letter dated *"16th day of October, 1998"*). However promotions were made in the fire service in 1998 and he was again by-passed for promotion. Fire officer Ambrose received a second promotion this time to fire sub-station officer. As to 2003, he submitted a written application to the chief fire officer in response to a notice advising of vacancies in the rank of fire sub-officer

in the engineering section. He submitted a written application. The application however was dated 25th June 2003, which was five days after the deadline for submission of applications. Firefighter Farrell Moore was actually promoted to the post. Three acting appointments to the post were also made. The appellant said that he was not aware that vacancies existed for which acting appointments were available because the same were never advertised.

[12] By letter dated 21st day of July, 2003 he wrote the chief fire officer and the Trinidad and Tobago Fire Service Association objecting to the four appointments in the engineering section. All of the firefighters appointed were junior to him and had less experience working in the engineering section. Moreover, officer Moore passed the promotion examination in 1992, whereas he (the appellant) passed this examination in 1981. He added that officer Moore was promoted because he (Mr. Moore) had brought judicial review proceedings against the State over his lack of promotion. He alleged that those proceedings were settled before Mendonça J (as he then was) on 18th September 2003.

[13] A large part of the appellant's case related to the filling out of his staff reports and the question of their availability for consideration before the Promotions Advisory Board and the Commission. He stated that in 1994, soon after his interview with the Board, he was shown five backdated staff reports over the preceding five year period which he was asked to sign (1990, 1991, 1992, 1993, 1994). The officer making the request had filled out the staff reports and back dated them although he was not the officer who supervised him. He stated that 1994 was the only occasion, prior to 1998, when he was shown his staff reports. Prior to 1991, public officers were not shown their staff reports.

[14] The appellant said that in 2003, the chief fire officer granted him access to his personal records. In his personal file he saw two further commendations in 1987 and 1994 of which he did not know. He never received any commendations from the chief fire officer in respect of the same. He did not see any staff reports or performance appraisals. He was told that the staff reports were not to be shown to him. Save the 1994 (back dated) reports he had never seen his staff reports.

The respondent's case

[15] The main affidavits in opposition to the motion were:

(i) The affidavit of Michael Mahabir of 21st April 2004

(ii) The affidavit of Annette Charles-Rennie of 21st April 2004

(iii) The affidavit of Ewart De Landro dated 12th May 2004

[16] The only other relevant affidavits for the purposes of this appeal are the affidavit of Lennox Seales dated 9th June 2006 and the affidavit of Gloria Edwards Joseph filed on 21st June 2006. The appellant answered these with an affidavit of his own dated 23 October 2006. It is convenient to group the various responses under specific heads. I shall refer only to those responses as are relevant to the issues and findings of this appeal.

The appellant's qualifications

[17] Ms. Charles-Rennie stated that despite all of his qualifications only the preliminary certificate from the Institute of Fire Engineers ("IFE certificate") fell within the criteria for promotion. The other items were factors to be considered by the Board pursuant to regulation 154 of the old regulations and are now considered by the chief fire officer pursuant to regulation 158 of the amended regulations. Mr. Mahabir stated that while it is true that the appellant attained the IFE preliminary certificate on 13th March 1981 he only passed the practical examination in 1986. Prior to 1986, the last practical exam was held in 1981.

[18] The records of the Director of Personnel Administration do not show that the appellant took the practical exam in 1981. The appellant thus became qualified by virtue of regulation 150 of the Regulations, to be interviewed by the Board for promotion but only to the rank of fire sub-officer. Had the appellant been promoted to the rank of fire sub-officer, his IFE certificate would have made him exempt from writing the promotion exam for the rank of fire sub-station officer. It would not have been possible for him to be promoted to the rank of fire sub-station officer and skip the rank of fire sub-officer.

1987 promotions

[19] Mr. Mahabir deposed that at its meeting held on 6th November 1987, the Commission established the 1987 order of merit list for the rank of fire sub officer, comprising 38 candidates. The appellant's name was not on the 1987 list of candidates interviewed by the Board and it can only be inferred that he was never interviewed in 1987. Subsequent to the 1987 interviews, the Board conducted interviews in 1994. The appellant was interviewed by the Board on 24th October 1994 to determine his suitability for promotion to the rank of fire sub-officer but did not attain a position on the 1994 Order of Merit List.

1994 promotion of officer Ambrose

[20] Mr. Mahabir said that it was true that the chief fire officer commended and highlighted the appellant and officer Dereck Ambrose No. 1529 for the outstanding performance of their duties. They were also recommended for acting appointments for the rank of fire sub-officer. Officer Ambrose was interviewed in 1994 along with the appellant for promotion to the post of fire sub-officer and was awarded a mark of 98.6% occupying the No. 3 spot on the 1994 order of merit list. Officer Ambrose was promoted to the office of fire sub-officer on 29th December 1994. In 1998, he was interviewed for the rank of fire sub-station officer. He attained the highest mark of all the candidates interviewed by the Board and occupied the No. 1 spot on the 1998 order of merit list. He was promoted to the rank of fire sub-station officer from 1st August 1998. The appellant not being on the 1994 order of merit list, would have had to be re-interviewed by the Board in any event, to determine his suitability for promotion. At its meeting on 31st December 1998, the Commission abolished the order of merit list system in light of the Fire Service Regulations and the amendment Regulations.

1998 promotions

[21] As to the 1998 promotion, Ms. Charles-Rennie said that the chief fire officer by memorandum dated 9th November 1998 to the appellant briefly explained to him the promotion procedure and indicated to the appellant that he was unable to adequately satisfy the Board when he was interviewed. The appellant although eligible for promotion was not found by the Board to be suitable for promotion.

2003 promotion

[22] As to his 2003 application Ms. Charles-Rennie said that the *"acting post"* of fire sub-officer in the engineering section was advertised by station notice no. 12 of 2003. A deadline of 20th June 2003 for all applications was stated. The appellant's letter of application, dated 25th June 2003, was received after the deadline and was not considered. She conceded that three officers junior to the appellant were appointed in July 2003 to act in the engineering section but said that their applications were submitted well within the deadline.

[23] As to the appellant's contention that he was never aware that there were vacancies for acting appointments in the engineering section, Ms. Charles-Rennie said that the vacancies for the acting appointments were advertised in accordance with the normal practice and procedure. The appellant was present when the contents of station notice 12 of 2003 were read out to all personnel present in the section as he admitted in paragraph 16 of his affidavit. The chief fire officer responded to his letter of objection to the four appointments dated 21st July 2003 by memorandum dated 22nd October, 2003 as follows:

> ***"Our records reveal that your application dated 25 June 2003, for acting appointment Re: Station Notice No. 12 of 2003 "Supervision – Engineering Section" was submitted after the deadline date of 20 June 2003.***
>
> ***Notwithstanding, you were informed via memorandum from the Deputy Chief Fire Officer, Ref: FS/PF: 9/5/1622 dated 14***

August 2003, that your application will be placed on file for future reference.

It would have meant that you would have been given the opportunity to act as soon as the position, which you applied for, was made vacant. It would have been an unprincipled decision by the Administration to terminate your junior's acting appointment, upon receipt of your late application, and appoint you.

With regards to your claim of being bypassed for promotion, the facts reveal that the last promotion conducted by the Public Service Commission was based on seniority of eligible candidates and ended at Service number 1573. Be guided accordingly."

Staff reports

[24] Ms. Charles-Rennie explained that annual staff reports are not kept on an officer's open personal file. They are kept in a separate confidential file in special cabinets in her office. When the officer is perusing his personal file he can make a request to see his staff reports/performance appraisal reports at the same time. She never received any such request from the appellant to see his staff reports.

[25] In response to the appellant's contention that he had never seen his annual staff reports, Ms. Charles-Rennie said that the fire service has diligently prepared the appellant's staff reports. Staff Reports for the periods 1981, 1982, 1983, 1984, 1985, 1986, 1994, 1995 and 1996 have been prepared. None of the reports contained any adverse comments on the appellant's performance of his duties. He was shown and initialled his staff reports for 1999 and 2000. She added the determination of an officer's suitability for promotion is not based solely on his ability to perform his duties as is stated in his staff report. It is only after the consideration of all of the 11 factors stated in Regulation 154 of the Regulations and Regulation 158 of the Amended Regulations that the officer's suitability for promotion can be determined.

[26] The members of the Board had knowledge of the appellant's performance of his duties because his staff reports were prepared and made available to it for his interview. She said it was not true that the appellant's staff reports were not prepared. Staff reports are always submitted to the Commission, along with the officer's personal file containing certificates from courses taken by the relevant officer, other qualifications that the officer would have attained, letters of commendation and the officer's work record. All officers, including the appellant, have seen their staff reports and initialled them.

[27] There were no documents on file to indicate any complaint by the appellant with respect to any failure to show him his staff reports. She said that the administration of the fire service has prepared the appellant's staff reports and performance appraisal reports in the same manner as it has prepared those for other officers within the service. The appellant had seen and initialled his staff reports and performance appraisal reports in the same manner as his co-workers.

[28] Ms. Charles-Rennie explained that although staff reports were replaced by the performance appraisal reports by regulation 39 of the Fire Service Regulations in 1998, the reform was not actually implemented until 1st January 2002. The fire service therefore continued to prepare staff reports until 2002. The appellant would have initialled a staff report for 2001 and not a performance appraisal report. Since the system for the performance appraisal report was not implemented until 2002, there would not have been any reports prepared for the period 1998 to 2001.

[29] In response to Ms. Charles-Rennie's allegation that the fire service had diligently prepared the appellant's staff report for the years 1981 to 1986 and 1994 to 1996 the appellant stated that the only staff reports he had signed were for the years 1999 and 2000.

Disclosure

[30] By notice dated 17th May 2004, the appellant sought disclosure of a number of items purportedly referred to in the affidavits filed on behalf of the Commission. The facts concerning the orders made by the court are not very clear. Discerning them has been difficult. Neither side in this case has properly explained the circumstances with alacrity. It appears that Aboud J, on 8th May 2006, ordered that the documents sought in the notice of 17th May 2004 be produced. These included the staff reports and letters of commendation of officer Moore, the appellant's staff reports, the order of merit lists compiled by the Promotion Advisory Board since the appellant had joined the service, the list of all eligible officers recommended by the chief fire officer for promotion from 1995, the priority list of fire officers eligible for promotion compiled by the chief fire officer since 1998 and the personal file of officer Dereck Ambrose. However, we have not seen this order. Mr. Ramlogan produced from the bar table, notes of evidence of the proceedings before Aboud J. The notes refer to an order of 8th May 2006 but no formal order was produced.

[31] Mr. Lennox Seales, in compliance with the order of Aboud J of 8th May 2006, produced a number of documents which largely satisfied the request. But there were documents which were not produced. The appellant's staff reports from 1983 to 1984 and 1986 to 1999 (up to the date of the order) were not produced. The staff reports and commendations of officer Moore were also not produced, so too the personal file of officer Ambrose.

Discussion and analysis

Preliminary objections

[32] Mr. Ramlogan made certain preliminary submissions which need to be addressed at this stage. He submitted that the judge did not say why he relied on evidence filed in breach of the *"unless order"* issued by Tam J on or about 26th April 2004. Neither did he indicate what weight he attached to the evidence of Ms. Charles-Rennie to which he had objected. The judge also did not indicate why he did not address the respondent's non-compliance with the further order for

disclosure of Aboud J made on or about 11th October 2006. This order was subsequent to the judge's orders for disclosure made on 8th May 2006 and 21st June 2006.

[33] It is unclear from the record what hearsay objections Mr. Ramlogan took before the judge. There are no judge's notes on the record. Indeed there is much about the record that is unclear and that includes the entire discovery process. In so far as Mr. Ramlogan objected to Ms. Charles-Rennie's evidence, the judge gave no ruling. To the extent that he erred by failing to do so, there was no appeal from that omission. The grounds of appeal mention only two objections, i.e. the non-compliance with the unless order of Tam J and the failure to disclose.

[34] But in so far as there was an objection to Ms. Charles-Rennie's evidence, I think that objection was ill-founded. Ms. Charles-Rennie stated her competence to give her evidence at paragraphs 2, 3 and 4 of her affidavit. I consider the facts stated therein to have set a proper basis for her to depose to the facts set out in her affidavit.

[35] As to the alleged breach of the unless order of Tam J, the three main affidavits of the respondent, that is to say the affidavits of Mahabir, Charles-Rennie and De Landro were all filed prior to the deadline set by Tam J. The affidavits of Lennox Seales and Gloria Edwards-Joseph were filed in response to the order of Aboud J of 8th May 2006. Mr. Ramlogan argued before this Court that the respondent used the disclosure order as an opportunity to adduce fresh evidence through the back door. The notes of evidence provided by Mr. Ramlogan indicate that before Aboud J he objected to certain documents exhibited to the affidavit of Lennox Seales on the basis that they did not relate to the 8th May 2006 order for disclosure. Aboud J then appeared to make certain rulings in respect of those objections and expunged certain paragraphs and exhibits from the affidavit. Ms. Edwards-Joseph does appear to refer to the promotion of officer Moore at paragraph 6 of her affidavit. That was not in response to the order of Aboud J of 8th May 2006. But at the hearing of 21st June, 2006 Aboud J does not, according to the notes of evidence, strike it out. It is true

that the judge did refer to "LS7" exhibited to the affidavit of Lennox Seales. It is not clear whether he drew any affirmative conclusion therefrom. However, it has played no part in my decision in this case. Thus, in so far as the respondent may have attempted to adduce evidence through the back door, it certainly did not influence the conclusions to which I have come.

[36] My examination of the file of the proceedings in the high court revealed that there was a status hearing before the judge on 14th January 2008. The trial commenced on 24th April 2008 and was adjourned to 29th April 2008, when the judge struck out the affidavit of Harran Ramkarransingh, attorney-at-law for the respondent. That affidavit had been filed in opposition to the production of the personal file of officer Ambrose and the production of the staff reports and letters of commendation of officer Farrell Moore, even though production had already been ordered by Aboud J on 8th May 2006 after hearing submissions. The trial judge also struck out a summons dated 24th April 2008 which sought to set aside an order of Aboud J made on 11th October 2006.

[37] That order of Aboud J (of 11th October 2006) is also not on record (indeed none of his orders is) but from my examination of the file in the high court proceedings and the summons itself, it related to the production of all commendations and staff reports in respect of fire officers who were junior to the appellant and who were promoted ahead of him. The expunging of both the affidavit and summons meant that both orders of Aboud J stood; that is to say the order of 8th May 2006 to produce the personal file of officer Ambrose and the order of 11th October 2006 to produce the staff reports and commendations of fire officers. The orders were sought so as to buttress the appellant's claims of breach of sections 4(b) and 4(d). It meant that the judge should have been aware that Aboud J's orders stood. The trial judge did not, however, address the consequences of the respondent's non-compliance with those orders, particularly the non-production of the personal file of officer Ambrose and the non-production of the staff reports and letters of commendation of officer Moore. But in my judgment, they had no effect on the outcome for the reasons I subsequently give at paragraphs 46 to 55 and paragraphs 50 and 51 in particular.

[38] Mr. Ramlogan also contended that cross-examination of the respondent's deponent was sought by the appellant but was not addressed by the judge who then relied on the absence of cross-examination to rule against the appellant. To the extent that it was an omission, I say that, unlike the trial judge, I do not consider that cross-examination was essential to the outcome, more so as it related to breaches of sections 4(b) and 4(d) of the Constitution. As to the judge's failure to address breaches of the disclosure order of Aboud J, in so far as those breaches related to the non-disclosure of the appellant's staff reports, it was a fundamental and fatal error to which I come at paragraph 56.

Delay/Alternative remedy

[39] I turn then to the issues raised in this appeal. The judge found that there was undue delay by the appellant in commencing proceedings in regard to the years 1987, 1994 and 1998 and that the appellant did not provide a proper explanation for his delay. In **Durity v. The Attorney General of Trinidad and Tobago [2003] 1 AC 405** Lord Nicholls at paragraph 30 opined that there was no express limitation period for commencement of constitutional proceedings and *"the court should therefore be very slow indeed to hold that by a side wind the initiation of constitutional proceedings is subject to a rigid and short time bar."* Lord Nicholls was speaking in the context of a submission by the Attorney General that the one year limitation period prescribed in the Public Authorities Protection Act applied to constitutional motions. Earlier in paragraph 30 he noted that:

> ***"… Clearly, the inherent jurisdiction of the High Court to prevent abuse of its process applies as much to constitutional proceedings as it does to other proceedings. And the grant or refusal of a remedy in constitutional proceedings is a matter in respect of which the court has a judicial discretion. These limitations on a citizen's right to pursue constitutional proceedings and obtain a remedy from the court are inherent in the High Court's***

jurisdiction in respect of alleged contraventions of constitutional rights and freedoms."

[40] At paragraph 35, he added:

"When a court is exercising its jurisdiction under section 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction."

[41] In **Attorney General of Trinidad and Tobago v. Ramanoop [2005] 2 WLR 1324**, Lord Nicholls provided further clarification on the issue. At paragraph 25 he stated:

"… where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.

26 That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional

proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But "bona fide resort to rights under the Constitution ought not to be discouraged": Lord Steyn in Ahnee v Director of Public Prosecutions [1999] 2 AC 294, 307, and see Lord Cooke of Thorndon in Observer Publications Ltd v Matthew (2001) 58 WIR 188, 206."

See also the decision of the Privy Council in **Webster & Ors. v. The Attorney General of Trinidad and Tobago [2015] UKPC 10** at paragraph 46 in which Baroness Hale of Richmond commented:

"There is no statutory time limit for bringing a constitutional motion. However, constitutional relief is discretionary and the lapse of time since the events in question is a relevant factor in the exercise of that discretion: see Durity v Attorney General of Trinidad and Tobago [2003] 1 AC 405. The defendant did raise the issue of delay before Moosai J, who commented, at para 26:

> ***'given the extraordinary sanctity of our fundamental human rights and freedoms, the courts are reluctant to shut out a deserving applicant on the ground of mere delay. However, where the delay is inordinate, then, failing a cogent explanation, a court may deny an applicant relief. Everything must depend on the circumstances …' "***

[42] I summarise the principles extracted from these cases as follows:

(a) There is no statutory time limit for the bringing of a constitutional motion but the high court's inherent jurisdiction to prevent abuse of its process

applies to constitutional proceedings.

(b) The refusal of a remedy on grounds of delay, in constitutional proceedings, is a matter in respect of which the court has a judicial discretion.

(c) There are also limitations on a citizen's right to pursue constitutional proceedings to obtain a remedy from the court which are inherent in the high court's jurisdiction under section 14(1).

(d) In considering whether there has been delay which would render the proceedings an abuse or would disentitle the claimant to relief it will be important to consider whether the conduct impugned or challenged was susceptible to adequate redress by a timely application to the court under its ordinary non-constitutional jurisdiction. If it was and if such an application was not made and now would be out of time then it was open to the court to conclude that it was a misuse of the court's constitutional jurisdiction.

[43] I say however that even if there were no alternative remedy to a constitutional claim it may still be struck out for delay where such delay is excessive and it would prejudice the proper defence of the claim.

[44] The appellant has alleged that his right to equality before the law and the protection of the law and his right to equality of treatment were infringed in the years 1987, 1994 and 1998. The period of delay is sixteen years in respect of the 1987 claim and nine years in the case of the 1994 claim. In respect of 1998 the delay is five years. The trial judge held that the claims for 1987, 1994 and 1998 were unduly delayed. He found that no sufficient detail was provided in the appellant's explanation that he could not afford to finance the process. I agree with his reasons. Further, of equal importance was an explanation of how he was now able to finance it. In respect of 1987 and 1994, the periods of delay are sufficient to prejudice the state in the conduct of its defence of the action.

[45] Mr. Ramlogan submitted that the judge failed to consider that the appellant had sought to have his complaints amicably resolved out of court by engaging the Commission. This, he said, was consistent with the modern approach taken by the courts and the Civil Proceedings Rules 1998. The

appellant only came to the court as a last resort. However commendable that approach may have been, nine and sixteen year efforts to amicably resolve a complaint speak eloquently to the fact that, at some stage, there ought to come a realisation that some other action is required. Moreover it is unreasonable to require the state to prepare a defence in respect of matters so dated, when witnesses may have retired or even died and records may have been destroyed or misplaced.

In the case of the 1998 claim however the delay was five years. Even though the explanation was not cogent, the delay was not so inordinate as to render the claim an abuse, given the reluctance of our courts to shut out constitutional claims. I consider that the judge erred in respect of this claim.

Were there breaches of sections 4(b) and 4(d)?

[46] But even if I am wrong on this question, I consider that there was no breach of the provisions of section 4(b) or of section 4(d). The law in Trinidad and Tobago as it relates to section 4(d) was summarised at paragraph 24 by Baroness Hale of Richmond in **Annissa Webster & Ors. v. The Attorney General of Trinidad and Tobago**, **Privy Council Appeal # 0048 of 2013 [2015] UKPC 10**, as follows:

> ***"The current approach to 4(d) of the Constitution of Trinidad and Tobago may therefore be summarised as follows:***
>
> ***(1) The situations must be comparable, analogous, or broadly similar, but need not be identical. Any differences between them must be material to the difference in treatment.***
> ***(2) Once such broad comparability is shown, it is for the public authority to explain and justify the difference in treatment.***
> ***(3) To be justified, the difference in treatment must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to***

be realised.

(4) Weighty reasons will be required to justify differences in treatment based upon the personal characteristics mentioned at the outset of section 4: race, origin, colour, religion or sex.

(5) It is not necessary to prove mala fides on the part of the public authority in question (unless of course this is specifically alleged).”

[47] At paragraph 25 she noted that:

> ***“It must, however, be acknowledged that there is a considerable overlap between the “sameness” question at (1) above and the justification question at (3). This is because the question of whether a difference between the two situations is material will to some extent at least depend upon whether it is sufficient to explain and justify the difference in treatment.”***

[48] As to the law in respect of section 4(b), Baroness Hale noted in **Webster** at paragraph 15 that, *“there is a clear distinction”* between section 4(b) and section 4(d). Equality before the law in section 4(b) *“requires that the laws themselves be equal”*. In my judgment, as a general proposition, section 4(b) speaks to laws which must be fair on their face and of equal application to all citizens. But where the law differentiates between groups or classes of persons, there must be a rational basis for such differentiation. As Baroness Hale noted in **Webster** (paragraph 15):

> ***“ … the problem is that the law necessarily has to treat different groups of people differently. The question is whether such distinctions are justified. There is a wealth of jurisprudence on this subject from the United States of America, where since 1868 the 14th Amendment to the constitution has guaranteed the equal protection of the laws. It is from this jurisprudence that we derive the concept of “suspect” classifications, such as race, which have***

to be strictly scrutinised and can rarely be justified, while for other classifications all that is required is a rational connection to the purpose of the law.

[16] It is worth noting that, in R (Carson) v Secretary of State for Work and Pensions [2006] AC 173, paras 15–16, Lord Hoffmann drew a similar contrast between those grounds of discrimination "which prima facie appear to offend our notions of the respect due to the individual" and "those which merely require some rational justification."

[49] The law as it relates to legislative classification in respect of 4(b) is clear. But section 4(b) also speaks to the fair administration of those laws; that is to say, the application of laws equally and fairly by those charged with their administration. In this case the complaint of the appellant under section 4(b) is to the unequal application of the law as opposed to discrimination by the laws themselves. In my judgment the test is the same as in section 4(d) except that section 4(d) is specific to a public authority while section 4(b) would apply to any arm or functionary of the state (which may or may not be a public authority) which is charged with administering the law. In this case the complaints of breaches of sections 4(b) and 4(d) are specific to the chief fire officer and the Commission.

[50] The evidence which has been disclosed by the respondent does not show any breach of the Constitution. There is simply no sufficient evidence of any comparator by which to judge the appellant in 1987. As to the 1994 promotion exercise in which officer Ambrose was promoted, Aboud J ordered that officer Ambrose's personal file be produced. It was not. The state's failure to comply with the court's order was a serious breach sufficient to have attracted the court's sanction including contempt of court. The matter was not pursued for reasons unknown. But I do not consider that the non-production of the file seriously affected the outcome in this case. Mr. Ramlogan did not specify what it was that was contained in the personal file of officer Ambrose which was required to assist

him and how the non-production of the file adversely affected his case. The purpose of its production simply could not be to permit the appellant the opportunity to trawl through its contents in the hope of obtaining information which may assist his case. Moreover, as the judge had found, the appellant has failed to provide enough detail of his own work record between 1980 and 1994 when officer Ambrose was promoted to show a basis of similarity.

[51] Also, while officer Ambrose and the appellant started on equal footing as firefighters and even though both he and the appellant were highly commended by the chief fire officer on one occasion, officer Ambrose, in respect of the 1994 promotion, placed third on the merit list while the appellant did not even attain the merit list. With specific reference to officer Moore, there was no unequal treatment. In his own evidence the appellant admitted that officer Moore's promotion was as a result of a settlement of High Court proceedings. In so far as there were other officers promoted who were junior to the appellant, even if the respondent did not produce the staff reports and the commendations ordered, there is simply not enough information upon which to conclude or infer that the appellant was treated differently, unjustifiably, from these unknown officers.

[52] As to the 1998 promotion, the judge was right that by dint of his earlier promotion, officer Ambrose was no longer a comparator. Further, officer Ambrose placed first in the interview and no doubt on an overall assessment of the criteria for promotion was found suitable for promotion. The appellant on the other hand had not satisfied the Board that he was suitable for promotion in 1998.

[53] In regard to the 2003 allegation of breach of sections 4(b) and (d), the appellant's application for promotion was palpably late and was rightly not considered. The station notice which is exhibited is clear as to the deadline. By his own evidence, he stated that he was present when the notice was read out to officers. He ought to have been aware of the deadline and cannot complain if he submitted his application after the deadline and was not considered. It is true that the notice did not refer to acting appointments but there was no unequal treatment or breach of the equality provisions of section 4(b). The application was late and

all those who applied on time were considered for acting appointments. To the extent that the appellant was misled by the notice, it was an administrative error. It was open to him to have challenged his non-appointment to an acting position by way of judicial review.

[54] Mr. Ramlogan submitted in the alternative that even if no proper comparator was found, the court should not slavishly take a step by step comparator approach. Rather, it should look at the facts of the case as a whole and identify the particular question to be resolved, in this case, why had the appellant been treated as he had been? He relied on **R v. Secretary of State for Work and Pensions ex. p. Carson [2005] UKHL 37**.

[55] I agree that such an approach may be adopted in a case in which an appropriate comparator is not available. But that approach does not assist him here. While the appellant appears to have been a competent and able officer, it is quite apparent from the evidence that he was one of many such officers and that competition for promotion was quite keen. It would be reckless to make such a finding on this evidence. Moreover, any such assessment in this case, requires that I conclude on the appellant's suitability for promotion which is ordinarily a matter solely for the Commission. Certainly, very cogent evidence would be required. That is not the case here.

The staff reports

[56] The appellant sought discovery of his staff reports over the period 1983 to the date of the order of Aboud J (8th May 2006). The respondent failed to produce staff reports for the years 1983 to 1984 and 1986 to 1999. No reason has been given for their non-production. Mr. Ramlogan submitted that in the absence of any production of the reports, the court must proceed on the basis that the staff reports were never prepared. I agree. Court orders are to be obeyed and complied with. There must be proper and sufficient explanation for non-compliance. Not only will the offender face the possibility of being in contempt of court but adverse inferences will be drawn from a failure to comply. Ms. Charles-Rennie

contended the appellant's staff reports for 1981 to 1986 and 1994 to 1996 had all been prepared. She stated that he was shown and had initialled his staff reports for 1999 and 2000. She added that his staff reports would have been prepared and available to the Board for his interview. Despite these very positive assertions however, staff reports covering some fourteen years were not produced as ordered by Aboud J.

[57] The judge did not address his mind to this breach. In failing to do so he fell into grave error. The staff reports covered the following years:

1. **1983-1984**
2. **1986-1987**
3. **1987-1988**
4. **1988-1989**
5. **1989-1990**
6. **1990-1991**
7. **1991-1992**
8. **1992-1993**
9. **1993-1994**
10. **1994-1995**
11. **1995-1996**
12. **1996-1997**
13. **1997-1998**
14. **1998-1999.**

[58] It seems to me that the adverse inference which must be drawn from their non-disclosure is that they were not completed. Harsh though this inference may be, it is not unrealistic. The evidence is that the Commission had been encountering problems with the completing of staff reports of officers over a number of years. The exhibit *"MD13"*, a memorandum from the acting Director of Personnel Administration addressed to Permanent Secretaries and Heads of Departments gives testimony to the many breaches, in respect of staff reports, which the Commission had cause to comment on and seek to correct.

[59] The staff reports are an important part of the criteria used by the Commission as a basis for assessing the officer's performance of his duties and his suitability for promotion. It is expressly provided for by regulation 158 of the amended regulations, as it was by regulation 154 of the old regulations.

[60] The Commission is required to consider all the matters set out in regulation 158 in deciding on the appellant's suitability for promotion. What weight it attaches to the staff reports will be a matter for the Commission but I daresay such staff reports will be of some importance. See **Rajkumar v. Lalla [2002] 4 LRC 40**. The failure to complete the reports would have meant that the Commission would not have had these before it in 1987, 1994 and 1998, when the appellant was considered for promotion. By regulation 34(1) of the old regulations staff reports were also required to be completed and submitted to the Director of Personnel Administration annually and were to be completed in respect of the appellant's period of service for the preceding twelve months. They were relevant for determining his eligibility not only for promotion but also receipt of an increment in salary. It was a breach of the appellant's right under section 5(2)(h) of the Constitution which is a particularisation of his right to the protection of the law. These regulations were procedural provisions provided to afford him a proper assessment of his performance and to allow him a fair opportunity for promotion.

[61] In considering an officer's promotional prospects the Commission will be interested to look at the officer's performance over the long term. One staff report will not be sufficient. Consistently good or excellent performances over a range of years will be examined. The Commission will have required such an overview when considering the appellant for promotion in 1987, 1994 and 1998. In the absence of such reports the Board and the Commission could not have properly assessed the appellant. The failure to complete the staff reports was a breach of regulations 34(1) and 154 of the old regulations and regulation 158 of the amended regulations. The appellant would not have had the benefit of the protection of regulations when considered for those years and as such was denied

the protection of the law.

[62] The appellant (although he suspected) was not aware of the non-completion of his staff reports until revealed in these proceedings. As such, he could not have been aware that he was being denied the protection of the law. Thus, while the 1987 and 1994 section 4(b) and 4(d) claims were affected by delay, I am not prepared to make the same finding in respect of the section 4(b) breach as it relates to the protection of the law and to the right to procedural provisions for the protection of his rights per section 5(2)(h). It is to be remembered that prior to 1991, officers were not shown their staff reports. While the appellant would have been entitled to see them after 1991 and could have complained and even sought judicial review to have them produced, there was an ongoing duty of the Commission to have these reports on file and up to date, particularly because they were required to assess the officer's promotional prospects as and when vacancies arose. I am aware that the appellant deposed that in 1994 he was shown five backdated staff reports for the previous five years. He deposed that he signed those reports which would by my calculation have covered the period 1989 to 1994. It is perplexing that not even these specific reports were produced. But the non-production of, at least, these reports begs the question whether they were ever properly before the Commission at the time of consideration of the appellant's promotional prospects.

[63] It follows therefore that the appellant's right to procedural protection under section 5(2)(h) was infringed. This is of course a further and better particularisation of his right to the protection of the law under section 4(b). The breach is a section 4(b) breach.

[64] There was some contention as to whether the appellant was in fact considered for promotion in 1987. If he was not considered the breaches of his 5(2)(h) rights would relate only to the 1994 and 1998 applications for promotion. Mr. Mahabir deposed in reply to the appellant's initial affidavit that it was likely that the appellant was not interviewed in 1987 because he was not on the list of candidates interviewed. The appellant in answer insisted that he was interviewed.

There has been no cross-examination. The appellant was firm in his answer that he was interviewed in 1987. I am prepared to accept that evidence. It was for the respondent to cross-examine on this question. Moreover, Mr. Mahabir in his affidavit acknowledged that the appellant became qualified for promotion in 1986. It is more likely that the appellant would then have been interviewed for the post, as he insists.

[65] The appeal is allowed. I order that damages for the breach of the appellant's right to the protection of the law (when he was being considered by the Commission for the years 1987, 1994 and 1998) be assessed by a judge in chambers. The appellant has succeeded in part. We will hear the parties on costs.

Nolan P.G. Bereaux
Justice of Appeal